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No. 88-1762

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October, 1989 Term

AGNES BERGEN, administratrix of the estate of Thomas Carl Kauppinen, et al.,

Cross-Petitioners,

vs.

THE F/V ST. PATRICK, et al.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Cross-petitioners adopt the statement of the questions presented by Petitioners Robert Kidd, et al., set forth at page "i" of their Petition for Writ of Certiorari ("the Petition") and incorporate said questions presented by reference as though fully set forth herein.

PARTIES TO THE PROCEEDING

Cross-petitioners consist of surviving seaman Wallace Thomas and the administrators or personnel representatives of five other deceased seamen's estates; Agnes Bergen, administratrix of the estate of Thomas Carl Kauppinen; Shannon Lee Youhas Jobe, administratrix of the estate of James Edward Jobe; Frank Ramero, personal representative of the estate of Ronnie Newton; James R. Sandin, personal representative of the estate of Vanessa Sandin; and Willard Gary Stallings, personal representative of the estate of Gary Todd Stallings.

Separate appellees in the Ninth Circuit Court of Appeals below have filed a Petition received by cross-petitioners on April 28, 1989. Those parties and the appellants/defendants below ar listed at pages "ii" and "iii" of that Petition which is adopted by cross-petitioners and

incorporated by reference as though fully set forth herein.

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OPINION BELOW

Cross-petitioners adopt the statement of the opinion below of petitioners Robert Kidd, et al., set forth at page 2 of their Petition and incorporate it by reference as though fully set forth herein.

JURISDICTION

Cross-petitioners adopt the statement of jurisdiction of petitioners Robert Kidd, et al., set forth at pages 2-4 of their Petition and incorporate it by reference as though fully set forth herein.

STATUTES INVOLVED

Cross-petitioners adopt the statement of the statutes involved of petitioners Robert Kidd, et al., set forth at pages 4-5 of their Petition and incorporate it by reference as though fully set forth herein.

STATEMENT OF THE CASE

Cross-petitioners adopt the statement of the case of petitioners Robert Kidd, et al., set forth at pages 5-11 of their

Petition and incorporate it by reference as though fully set forth herein.

ARGUMENT

I. Reasons for Granting the Writ.

Cross-petitioners adopt and incorporate herein by reference the reasons for granting a writ of certiorari in this case advanced by petitioners Robert Kidd, et al. at pages 11-47 of their Petition including the appendix to said Petition.

In addition to the reasons outlined by petitioners Robert Kidd, et al., a writ of certiorari should be granted in this case because first, the issue of whether punitive damages are available in a maritime case under the appropriate circumstances, is a vitally important question of federal law which must be settled by this court; second, the Ninth Circuit's decision is in conflict with the decision of other federal courts of appeal; and third, the Ninth Circuit's decision so

far departs the accepted and usual course of judicial proceedings to require this court to exercise its power of supervision to correct it.

II. Whether Punitive Damages are Available in a Maritime Case Under the Appropriate Circumstances is an Important Question of Federal Law Which Should be Settled by this Court.

The concept of punitive damages is a time honored characteristic of anglo-saxon jurisprudence. The award of punitive or exemplary damages to punish in civil matters and to provide an example to deter others from offending in like manner, has been recognized by this court, as well as the highest court in nearly every state in this country.

For example, punitive damages are available as a civil deterrent against the manufacturers of asbestos who place asbestos in the schools knowing that asbestos can cause catastrophic harm to humans. Likewise, punitive damages are

available as a deterrent against persons and entities who carelessly fill the air of our environment with toxic chemicals or pollute our rivers with industrial waste, sludge, and garbage. Punitive damages are regularly accessed against businessmen and businesswomen who engage in stock fraud or other securities violations.

And just over the horizon looms perhaps one of the most important lawsuits in the maritime history of Alaska, the wreck of the EXXON VALDEZ, where carelessness, negligence and perhaps criminal misconduct at sea, has created undoubtedly the worst environmental tragedy to befall the northwestern coast of America since the San Francisco earthquake of 1906.

In preparation for the day of reckoning before the courts of justice for the harm caused by that event, this court should leave no doubt that punitive damages are available under the general maritime

laws of these United States. Indeed, the law exacts tremendous penalties for civil wrongs of all types, cutting across all socio-economic fields. The federal laws relating to anti-competitive practices carry punitive damages in the form of tripling the actual damages in a given case. In fact, had the Respondents engaged in willful, wanton, and contemptuously negligent conduct in any other industry besides the maritime industry, there would be no question but that they would be subject to punitive damages. Here, however, because the Respondents were the owners and operators of a vessel operating on the high seas, they enjoy a puzzling judicial immunity, fashioned over the years by several disjointed maritime decisions.

This case squarely presents the issue of whether or not punitive damages are available in maritime cases for extremely

egregious maritime negligence. The issue may never be more squarely framed. The opportunity to provide guidance to lower federal courts and maritime practitioners will likely never be more readily available.

The Ninth Circuit squarely held that "where an action under DOSHA is joined with a Jones Act action, neither statutory scheme may be supplemented by the general maritime law or by state law." Bergen v. St. Patrick, 816 F.2d 1345, 1347, modified on reh'g, 866 F.2d 318 (9th Cir. 1989). This case, therefore, offers a compelling opportunity for this court to provide guidance in an area of the law which this court itself has described as "torturous." Offshore Logistic v. Tallentire, 477 U.S. 207, 211, 106 S. Ct. 2485, 2489, 91 L. Ed. 2d 174 (1986).

This question is one of national importance with significance far beyond the

petitioners and cross-petitioners themselves. The importance of providing an effective deterrent to keep our maritime industry safe is manifest. Public policy, as well as this court's longstanding tradition of giving great deference to the claims of seamen, all support an award of punitive damages under the appropriate circumstances in maritime law.

For these "special and important reasons," certiorari should be granted in this case to review the Ninth Circuit's decision. Supreme Court Rule 17.1,

III. The Ninth Circuit's Decision is in Conflict with the ~~Decision~~ of Other Federal Courts of Appeal.

The conflict, confusion, and uncertainty concerning whether punitive damages are available in maritime cases also provides a compelling reason for granting certiorari. Accord Wilson v. Garcia, 471 U.S. 261, 266, 105 S. Ct. 1938, 1941-42, 85 L. Ed. 2d 254 (1985). The

decision of the Ninth Circuit below, is in direct conflict with the decision of the Fifth Circuit in In Re: Mary Shipping, Inc., 650 F.2d 622 (5th Cir. 1981), and the California Court of Appeals decision in Baptiste v. Superior Court, 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980), cert. denied, sub nom, Chevron Shipping Co. v. Batiste, 449 U.S. 1124, 101 S. Ct. 940, 67 L. Ed. 2d 110 (1981). Appellate courts having major concern with maritime law, are thus in conflict as to whether punitive damages are available in maritime cases. This court should grant certiorari in order to resolve this conflict. Supreme Court Rule 17.1(c).

The direct conflict between the Fifth and Ninth Circuits concerning whether punitive damages are available in maritime cases is of particular import in view of the Prince William Sound oil spill tragedy mentioned above. The calendars of the

United States District Courts in both Alaska and Washington are quickly filling up with lawsuits for compensatory and punitive damages. This case, therefore, presents an excellent opportunity for this court to provide guidance to the lower federal courts that will be considering these cases in the years ahead. Failure to resolve this issue will leave the lower federal courts in conflict and confusion, resulting in a myriad of possibly conflicting decisions depending upon where the case was brought. The opportunity for this court to provide guidance to the lower federal courts shows that the disagreement among circuit courts is of far more than academic interest. The opportunity to provide instruction and guidance that will have such immediate and practical application is, in fact, unprecedented.

The current state of flux, conflict and confusion among the lower federal

courts on this issue is described by numerous scholars. See e.g., G. Waddell, Punitive Damages in Admiralty, 19 J. Mar. L. & Com. 65 (1984); G. Waddell, Punitive Damages in Admiralty, XXI Tort & Ins. L. J. 425 (1986). As noted by Mr. Waddell in 1986:

> In summary, as to seamen's personal injury and death, two appellate cases have declared that under proper facts punitive damages may be recoverable in unseaworthiness cases under the general maritime law. One appellate case has held punitive damages not to be recoverable under the Jones Act. One appellate case has indicated that if they are recoverable it can only be where the ship owner authorized or ratified the conduct.

G. Waddell, Punitive Damages in Admiralty, XXI Tort & Ins. L. J. at 431. This conflict, in an area of national significance and importance should be resolved by this court. This case presents the perfect opportunity to do so. Certiorari should, therefore, be granted.

IV. The Ninth Circuit's Decision so far Departs the Accepted and Usual Course of Judicial Proceedings as to Require This Court to Exercise its Power and Supervision to Correct it.

In rendering its decision, the Ninth Circuit failed to adhere to this court's explicit directions that a reviewing court must apply the "clearly erroneous" standard of review to a trial court's decision as finder of fact. E.g., Anderson v. Bessemer City, 470 U.S. 564, 571, 105 S. Ct. 1504, 1510, 84 L. Ed. 2d 518 (1985). A comparison of the Ninth Circuit's decision with the explicit findings of fact made by the trial court points out the extent of this error committed by the circuit court. The Ninth Circuit not only failed to apply the "clearly erroneous" standard of review, as this court has instructed, the circuit court instead substituted its own de novo judgment for that of the trial court. (See, Petitioners Robert Kidd, et al.'s Petition at 34-45.) The Ninth Circuit's

complete abdication of its appropriate role of review so far departs the excepted and usual course of judicial proceedings that this court should grant certiorari in order to correct it.

V. Conclusion.

This court will perhaps never again be presented with such an excellent opportunity to provide instruction and guidance on the important question of federal maritime law of whether punitive damages are recoverable in maritime cases. The issue is unequivocally and squarely framed in this case. The general conflict and disarray among the lower courts on this question also militates in favor of granting certiorari in this case. Furthermore, this case presents an opportunity to resolve conflicts and to announce a general rule of law on punitive damages in all maritime cases.

Finally, this case presents an

opportunity to once again instruct the lower federal courts on the appropriate standard of review to be used when reviewing a decision of a trial court sitting as a finder of fact. A question of judicial administration of the utmost importance, that will have impact far beyond the confines of this case.

For all of the above reasons, this court should grant this Cross-petition for certiorari, as well as Petitioner Kidd, et al.'s Petition for certiorari, review the decisions below, reverse the court of appeals denial of punitive damages to all petitioners, and reinstate the judgment of the district court awarding them punitive damages.

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DATED this 24 day of May, 1989

at Anchorage, Alaska.

HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS

Counsel for
Cross-Petitioners

By: _____
James D. Rhodes